CAUSE, LEGAL CAUSE AND PROXIMATE CAUSE. II

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II. Passive Situations as Proximate Causes

THE problem connected with finding a passive situation to be a proximate cause is very different from that connected with finding an active force as a proximate cause. The reason for this difference is that the situation does nothing actively. It simply exists. Before it can contribute to an injury a force must be ejected from it or else the injured party must be brought, or bring himself, into contact with it. The situation never *does;* it just *is.* It is never an aggressor. Its contribution to any given injury is a passive contribution. The situation is usually created by the exercise of a force. But the force ceases to operate actively when the situation is created. Only the situation remains. The force is gone, and the situation is immobile.

A simple illustration will make this clear. A digs a hole in the ground in the highway. This digging is forbidden by law. B, coming along the highway, falls into the hole and is injured. The hole is a passive situation. It has contributed by its mere existence to the injury sustained by B. But B had to bring himself into contact with the hole. He had to fall into it before he was hurt. The hole did not rise up and hit B. B actively produced his own injury. He utilized the hole in the ground as an agency. The hole was passively instrumental. A's act of digging the hole was an act of force. But that force had come to rest. It was over. The force created an inactivity; but inactivity does not aggress. Dean Pound's jural postulate, quoted above, does not apply. Nor does the rule that a direct application of force is a proximate cause. Some other reason for considering the hole in the ground as the proximate cause of the injury sustained must be found, and some rule applicable to passive situations must be evolved from the adjudicated cases.

1. Definition of a Passive Situation

A passive situation is a physical object or condition which has no inherent power of motion.

Examples: A hole in the ground; an uncovered well; a wire stretched from a fence to a telegraph pole; an areaway; and spread rails of a railway track.

The passive situation may contain active or potentially active forces within itself, but the situation is itself immobile.

Examples: A box containing sticks of dynamite; a high tension wire through which high voltage electrical currents are passing; a package of fire-works; and a percussion cap.

2. A Passive Situation as a Legal Cause

For a situation to be a legal cause it must have the same characteristics that a force has when it is looked upon as being a legal cause.

i. The situation must be a scientific cause of the injury which the plaintiff has sustained.

ii. The creation or the continuance of the situation must be forbidden. It is the forbidden quality of the situation which gives to the scientific cause of an injury its legal aspect.

3. A Passive Situation as a Proximate Cause

A situation may contribute to the incurring of a given injury in one of two ways. The injured person may come into contact with the situation and this contact may produce the injury; or a factor within the situation may be ejected from the situation and come into contact with the injured person. This ejection may result spontaneously because of the nature of the factors within the situation; or it may result because of the activity of forces external to the situation. Where there is such a spontaneous ejection the situation has ceased to be passive. It has become active. Hence it need not be considered as a passive situation at all. It can be looked at as an active force. The act or omission of the defendant in creating or permitting the existence of that active force is the proximate cause of the injury, if the act or omission is forbidden, and so forth. If it is not, then such act or omission is not the proximate cause, and the injury may be considered from the standpoint of the doctrine of liability without fault, and so forth. In either case it is outside of the scope of an inquiry into a passive situation as a proximate cause. Where the ejection is the result of forces external to the situation, then the ejection is within the scope of such an inquiry.

The plaintiff may be injured through the conjunction of the situation with the force of (a) the defendant, (b) the plaintiff, (c) a third party, (d) an animal, (e) a force of nature.

Of these, the first, the force of the defendant, can be eliminated from consideration here. It has already been considered above under the direct application of force. The situation is merely a chain in the causal sequence. The defendant may cause the situation to erupt, or may force the plaintiff to come into contact with the situation, or may cause a third party, an animal or a force of nature to bring the plaintiff into contact with the situation. In all of this the act or omission of the defendant is the proximate cause of the injury to the plaintiff and the situation is only one link in the causal chain. There has been a direct application of force upon the plaintiff or upon that which did act directly upon the plaintiff to the hurt of the plaintiff. The defendant's acts or omissions do not concern us here.

A. PASSIVE SITUATION AND THE ACTIVITIES OF THE PLAINTIFF

Where the plaintiff comes into contact with the situation through his own lawful activity and such contact results in an injury to him, the passive situation is the proximate cause of the injury.

Examples: (a) X digs a hole in the sidewalk, which digging is wrongful. Y, lawfully walking on the sidewalk, falls into the hole and is hurt.

The hole is the proximate cause of the injury.[36]

(b) X permits a dangerous obstruction to exist upon a sidewalk. Y, walking along the sidewalk, is seized with vertigo, falls upon the obstruction and is killed.

The obstruction is the proximate cause of the death.[37]

(c) X City maintains a defective bridge. Y is driving his horse over the bridge. The horse breaks through the bridge. Y in trying to extricate it is hurt.

The defective bridge is the proximate cause of the injury.[38]

In such cases the plaintiffs were where they had a right to be

[36] Pike v. Jamestown, 107 N. W. 359.

[37] Woodson v. Metropolitan Street Ry. Co., 224 Mo. 685; BEALE, 225. The court used the following sentence, which I think is significant: "Because deceased was diseased he was not precluded from walking upon the sidewalk."

[38] Page v. Bucksport, 64 Maine 51.

and were doing that which it was their right to do. They were in the pursuit of their lawful activities, within a place where they should have been free from injury. That they were injured shows that the sphere within which they should have been free from injury while in pursuit of their lawful activities had been cut down. It is this circumscription of the sphere of their lawful activities which makes the situation the proximate cause of the injury. It puts bounds where no bounds ought to be. And the converse of this is true. If the activities of the plaintiff are not lawful; if he is where he has no right to be (as, for instance, upon a defective bridge which has been condemned and is barricaded against passage and with signs up warning against use by anyone), then the situation is *not* the proximate cause of the injury.

B. PASSIVE SITUATION AND THE ACTS OF A THIRD PARTY

i. Where a third party brings the plaintiff into contact with the situation, the situation is not considered as the proximate cause of the injury which the plaintiff sustains because of such contact.

Example: (a) X leaves an areaway unguarded. This is against the provisions of a local ordinance. A, B, and C come skylarking down the street. As they pass the areaway A playfully shoves B, who falls into the unguarded areaway and is injured. B sues X and loses.

The situation is not the proximate cause of the injury.[39]

Here it is obvious that the sphere of activities which B lawfully has was not cut down by the situation. B did not rightfully belong in the areaway, nor did he get there by his own volition; he was thrown into it. X was not connected with the force which brought B into the areaway. The areaway did not rise up and engulf B. You cannot attach the actions of B to the situation in any way. Nor can you attach the actions of A to the situation. The situation neither compels nor circumscribes the lawful actions of either A or B to the hurt of B. The existence of the situation is a scientific and indeed, by definition, a legal *cause* of the injury to B, but it is not the proximate cause.[40]

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[39] Milostan v. Chicago, 148 Ill. App. 540.

[40] McIntire v. Roberts, 149 Mass. 450, is a case in point.

(b) To the facts given in example (a) above add this: X compels A to throw B into the areaway.

Here the situation would not be the proximate cause of the injury. It is eliminated as the proximate cause, although it remains as a part of the causal sequence leading to the injury sustained by B, because X has created a direct application of force upon B. It would be immaterial whether X created the situation or not.

ii. Where a third party, in the lawful pursuit of his activities, causes a force to issue from a forbidden situation to the hurt of the plaintiff, the situation is the proximate cause of the injury.

Example: (a) Milling operations fill the rooms of a grain elevator with combustible dust. A in lighting his pipe, which he could rightfully do, exploded the dust, to the hurt of B. The situation was held to be the proximate cause of the injury.[41]

The weight of authority supports the rule as here given. There are many cases contra. But these cases, it is submitted, are usually based upon the doctrine of foreseeableness and a confusion of the principles of negligence with the principles of causation. Even a cursory examination of these cases will prove this to be so.[42]

The weight of authority can be sustained on principle. The act of the third party which sets off the situation is a lawful act. It is a scientific cause of the injury in that it contributed to that injury. But it is not a *legal* cause, for it is not a forbidden act. The force of the third party can therefore be eliminated from consideration. That it is a force which intervenes between the creation of the situation and the injury to the plaintiff is true, but it is not an *unlawful* force; therefore the law need not look to that force. It is outside the limits within which the law will look for proximate causes of this particular injury. The situation is an unlawful one. It, therefore, partakes of the elements to which the law will look when hunting for proximate causes. It fulfills all the requirements of a proximate cause and so is considered as such.

iii. Where a third party in the *unlawful* pursuit of his activities

[41] Quaker Oats Co. v. Grice, 195 Fed. 441, and cases there cited.

[42] Seith v. Commonwealth Electric Co., 241 Ill. 252, and cases cited. The trend of decisions is, I think, away from this case.

causes a force to issue from a forbidden situation to the hurt of the plaintiff, the situation is *not* the proximate cause of the injury.

Example: (a) X negligently stores dynamite in a building. A and B trespass on the grounds where the building is. A without right shoots into the building and explodes the dynamite. B is hurt. B sues X. The situation is held not to be the proximate cause of the injury.[43]

The cases are practically split on this set of facts. There is a slight weight of authority in favor of the rule as presented.[44] On principle, it is submitted, the rule is as stated. The situation is an agency utilized wrongfully by the third party. Had the situation been left to itself it would not have hurt the plaintiff. The act of the third party was an independent intervening force. The situation did nothing to that force. Nor did it prevent the force from operating within its own proper sphere. The intervening force was out of bounds. It was operating where it legally should not have operated. The passive situation could not help itself. It could not prevent the force from operating. The situation did not eject the harming force. That force was pried out of it by a power which had no business being there. The reason for making a passive situation a proximate cause is that it prevents lawful activity. That reason is not present in the instant case. The situation, therefore, is eliminated as a proximate cause.

The general principle governing a passive situation as a proximate cause, so far as its connection with the acts of the plaintiff and of third parties is concerned, can be stated as follows:

Where a forbidden passive situation circumscribes the sphere within which the lawful activities of the plaintiff or of a third party may operate, and such activities produce the injury to the plaintiff, the forbidden passive situation is the proximate cause of the injury to the plaintiff.

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[43] Fanning v. J. G. White Co., 62 S. E. (N. C.) 734 (1908); McGee v. N. & S. Ry Co., 60 S. E. (N. C.) 912.

[44] A recent case is that of Henderson v. Ashby, 200 S. W. (Ky) 931. Compare with Watson v. K. & I. Bridge Co., 137 Ky. 619; compare Harton v. Forest City Tel. Co., 146 N. C. 429, with Clark v. Chambers, 3 Q. B. 327. See Chacy v. The City of Fargo, 5 N. D. 173, and Pastene v. Adams, 49 Cal. 87.

C. PASSIVE SITUATION AND THE ACTIVITIES OF AN ANIMAL

So far as the relation of a passive situation to the activities of an animal is concerned, there is only one phase of the matter that needs to be discussed with any degree of detail. That phase is presented when the situation allows the activities of the animal to take that animal out of the place where it had been confined by the owner of the animal. There are three other phases which present matters that have already been considered in principle and can be briefly mentioned and dismissed.

i. When the act of X drives the animal into a forbidden situation and the animal is hurt, the act of X is the proximate cause of the injury. It is an illustration of the direct application of force by X and the existence of the situation is but a cause or a legal cause of the injury. It is not, it is submitted, necessary to consider the situation as a proximate cause in order to dispose of the case. This would be true whether or not X created the wrongful situation.

ii. When the act of a third party drives the animal into the situation and the animal is injured, the situation, though wrongful, is also eliminated if the act of the third party is forbidden. If it is lawful, then I should say that the situation was the proximate cause of the injury, putting the matter as analogous to the relation of the passive situation to the acts of a third party which has already been discussed above.

iii. When the activities of the animal, which animal is where it has a legal right to be, brings it into contact with the situation which is wrongful, and the animal is hurt, then the situation is the proximate cause of the injury. The situation has circumscribed the area within which the animal may legally operate, and this circumscription makes the wrongful situation the proximate cause of the injury. The situation is analogous to that where the plaintiff himself is directly hurt through his own activities which bring him into contact with the situation. A person and his property are treated alike in this matter.

These three phases present no difficulties. But a fourth phase does present considerable difficulty. The fourth phase is this:

D creates a wrongful situation, which makes it possible for an animal to leave the place where it is rightfully, and to come into the path of a force or situation which is not connected with the activity of D, and this contact results in an injury to the animal.

Examples: D lowers fence bars of a fence belonging to P. The fence enclosed a field where sheep belonging to P were grazing. The sheep wandered away from their pasture and were destroyed by a bear.

The situation created by the defendant was held to be the proximate cause of the injury to the sheep.[45]

(b) D destroys a fence surrounding a pasture where a mare is grazing. There is a lot of barbed wire fencing in the vicinity of the field. The mare leaves the pasture, is caught on the barbed wire and is greatly injured. The situation which D created is held to be the proximate cause of the injury.[46]

In these cases the activities of the animal brought it into contact with the dangerous force or situation which intervened between the creation of the situation by the defendant and the injury the animal sustained. The situation created by the defendant did nothing actively to the activities of the animal. It only allowed those activities to operate through a certain channel for a time. The injury did not occur within this channel, spatially considered. The injury occurred elsewhere. The activities which produced the injury, *inter alia,* flowed through the situation to the place where the injury occurred. But the situation made it possible for the activities of the animal to take the animal out of the control of the plaintiff. It was this loss of control, this removal of restraints upon the activities of the animal that permitted the animal to come into contact with the injuring force or situation. It is this removal of control which makes the wrongful situation the proximate cause of the injury. The situation is a cause, as it contributes to the injury. It is a forbidden situation, therefore it is a legal cause of the injury. It has allowed intervening forces to utilize its own existence as a channel, or conduit, to hurt the animal. It is this which connects it up directly

[45] Gilman v. Noyes, 57 N. H. 627. This case was sent back for a new trial on another question.

[46] West v. Ward, 77 Ia. 322; BEALE, 195. For a case contra, see Kelsey v. Rebuzzini, 89 Atl. 170; BEALE, 197.

with the injury so that it is looked upon as a proximate cause of the injury. Because the control of the animal, the safeguards thrown around it, have been removed, the animal's activities have produced the hurt of the animal. Such removal of control is the proximate cause of the injury. The rule can be stated thus:

Where a situation allows the control of an animal to be destroyed and the activities of the animal bring it into contact with that which injures it, the situation is the proximate cause of the injury.[47]

D. PASSIVE SITUATION AND THE ACTION OF A FORCE OF NATURE

A natural force is a power in the material universe which is not created by a human being, such as hail, snow, lightning, floods, forest fires (which are started by spontaneous combustion), etc. Natural forces begin to operate irrespective of human agencies, but human agencies may direct or deflect the natural forces so that the path of their activities may be changed. A dam across a river or a canal dug along side of a mountain stream may back up or run off the waters of a stream which is high by reason of a spring freshet. A human being may also create a passive situation into which a natural force may enter to the injury of anyone or anything which may be with that situation. So that a passive situation may be instrumental in contributing to the injury, by a natural force, of a person or thing in two ways. It may deflect or conduct the natural force to the place where the injured person or thing is, or it may hold the injured person or thing in a position or at a place where the natural force strikes to the injury of the person or the thing. In either case the injury is actually produced by the natural force. When a dam backs up the waters of a stream and the waters flood the adjacent meadows it is the water and not the dam which actually harms the meadows. When lightning strikes a wire stretched between two buildings and runs along that wire to one of the buildings, which is set on fire, it is not the wire which does the damage, but the lightning. When a trap placed on a mountain path catches a person and holds him there, and then an avalanche overwhelms that person, it is not the trap but the landslide that actually destroys the person. The problem is this: How can the passive situation be tied up to the activities of the nat-

[47] Gilman v. Noyes, *loc. cit. supra;* West v. Ward, *ibid.;* Sneeby v. Lancashire & Yorkshire Ry., 9 Q. B. D. 262; BEALE, 184, gives an interesting though brief discussion of the element of control of animals.

ural force so as to make the situation the proximate cause of any injury which the natural force actually produces?

The solution is found in facts, some of which we have already discussed and some of which present new matters for analysis. The situation, as we have said before, must be a cause of the injury; that is, it must contribute to the injury. It must also be a forbidden situation that is created or allowed to exist wrongfully. Before it can be a proximate cause of the injury it must be a legal cause of the injury.

Where the forbidden situation acts as a conduit for the natural force, or can be utilized as an agency by the natural force, the forbidden situation is the proximate cause of the injury. The reason why it is the proximate cause is that the situation is the only *legal* cause that exists in the complex of causal sequences which contributes to the injury. Natural forces are outside the control of the law. The law cannot forbid natural forces from operating. The wind bloweth where it listeth. Within the delimited sphere of cause and effect stretching between the creation of the situation and the accruing of the injury the law must ignore the operation of natural forces. They can never be forbidden in any practical sense. But anything which assists a natural force, unless, indeed, that assisting agency is itself a natural force, *can* be considered and handled. If the situation deflects or carries the natural force, and that situation was humanly created, the situation need not be ignored. The law can operate upon it. It can be, and is, a legal cause, and as it is the only legal cause and it does result in a direct application of the natural force upon the plaintiff to his injury, it is the proximate cause of that injury in the same way as it would be the proximate cause of any injury produced by forces which spontaneously erupted from it.

The rule growing out of this class of cases can be stated in this way:

Where the forbidden situation deflects, or acts as a conduit for, a natural force and that force produces an injury, the forbidden situation is the proximate cause of the injury.[48]

Instead of deflecting or acting as a conduit for the natural force which impinges upon the plaintiff to his hurt, the passive situation

[48] Cheeves v. Danielly, 80 Ga. 114; BEALE, 178.

may contain or hold the plaintiff, or his property, and the natural force may enter into that situation and injure the plaintiff.

Example: D wrongfully detains the goods of P in a warehouse which stands on the bank of a river. A flood comes along, enters the warehouse and destroys the goods of P. The situation is the proximate cause of the injury.[49]

Here the defendant allows a situation of goods lying in a warehouse to continue wrongfully. The natural force comes into the situation to the injury of the goods.

Before the wrongfully created situation can be a proximate cause it must be a cause of the injury, a forbidden cause, and must continue as a forbidden cause during the time the natural force is acting within the situation. If either of these last two elements is lacking the passive situation is not the proximate cause of the injury. That is, there must be a concurrence in time and space of the existence of the situation and the activity of the natural force in order to make the situation the proximate cause of the injury.

The reason for this is similar to the reasons already discussed above. The situation does nothing. It is a container of that which is injured and nothing more. The injury is actually produced by the flood coming into contact with the goods. But the flood cannot be considered by the law. There is nothing wrongful about it from a legal point of view. It is surely a cause of the injury, but it is not a forbidden cause. Neither statutes, nor common law, nor imperial edict can stay the action of rising streams. King Lex cannot command the waves, so he ignores them. But the situation is within the purview of the law. It is within the delimited sphere of cause and consequence within which the law operates when hunting for a proximate cause. The situation can be removed or changed. The law can order such removal or change. The situation is amenable to law through those who create the situation or allow it to remain.

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[49] Green-Wheeler Shoe Co. v. C., R. I. & P. Ry., 130 Ia. 123. Compare this case with Denny v. N. Y. C. R. R., 3 Gray (Mass.) 481, which is the converse of the preceding case. For a discussion of these two cases and cases like them, see Beale, Proximate Consequences of an Act, 33 HARVARD LAW REV. 633, 655; Levitt, A Passive Situation as a Proximate Cause, 92 CENTRAL LAW JOURNAL 390, 396 *et seq.* See Jackson v. Wisconsin Tel. Co., 88 Wis. 243; also, Dubuque Wood and Coal Association v. Dubuque, 30 Iowa 176.

Human agencies are attached, or can be attached, to the situation. That is why the law looks to it. It can be a proximate cause as it is a forbidden legal cause. But when is a forbidden situation a proximate cause when the natural force enters into it? An examination of the decided cases shows that the situation must actually hold the injured person or property in the path of the force at the time the force is acting. The *holding* is the element which turns the legal cause into the proximate cause. If the situation is in one place and the natural force impinges upon the person in another place, the forbidden situation is not the proximate cause of the injury to the person that is hurt. So far as I have been able to discover, the presence or absence of the element of concurrence in time and space of the situation and activity of the natural force determines whether the situation is or is not the proximate cause of the injury. I, therefore, take it to be the hallmark of the forbidden situation as the proximate cause of the injury. The rule may be stated as follows:

When a forbidden passive situation concurs in time and space with the activity of a natural force upon or within that situation, and such activity produces an injury, the situation is the proximate cause of the injury. Where the passive, forbidden situation does not so concur the situation is not the proximate cause of the injury.[50]

E. PRELIMINARY SUMMARY

The rules concerning a passive situation as a proximate cause of an injury can be summarized and condensed as follows:

If an injury is produced by the concurrence of lawful activities, or of activities which are outside the purview of the law, and a forbidden passive situation, the passive situation is the proximate cause of the injury.

III. GENERAL SUMMARY OF THE THEORY OF FORBIDDEN CAUSAL ACTION

According to the theory of Forbidden Causal Action, the search for the proximate cause of an injury is an objective search. It is not a metaphysical or speculative inquiry. It is a simple inspection of existing facts. It is a practical matter dealt with in a practical

[50] I have made no attempt to present the cases bearing on this point at this time. They are collected in the articles and cases cited in the preceding note.

and simple way. The plaintiff comes into court alleging that he has received a specific injury and that a specific act or omission chargeable to the plaintiff produced that injury. The court then looks at the section of existence which is limited at one end by the injury to the plaintiff and at the other by the act or omission which it is alleged produced that injury. He asks simply whether there was an act or an omission which was forbidden; whether that forbidden act or omission was a cause of the alleged injury in fact; that is, can it be definitely tied up to the injury by an unbroken chain of activity and consequence. If forces or situations intervene between the act or omission and the injury he looks to see if the act or omission *actually produced* that intervening force or can be directly connected with its production or utilization. He can begin at the act and go down the chain until he reaches the consequence or a break in the chain of cause and consequence; or he can start at the consequence and work back to the act or to a link in the chain of causation which breaks connection with the act; or he can start from both ends and work toward the middle to see if they really meet. In any case, he looks at existent facts, He does not need to predict, conjecture, guess, or foresee anything. The act is over; the injury exists; the connection between them must exist also in the world of facts. These facts he turns to and examines. He finds that the facts are in certain relations to each other. He then asks whether these relations are the relations covered by the legal rules which he must apply. He examines the relations and examines the rules. He finds that the rules do or do not fit the factual relations. He gives his judgment upon that finding. I am speaking of the court here as being both judge and jury. It is, of course, assumed that the jury finds the facts and what their relations are and that the judge applies the rules of law to these facts. Both judge and jury, however, examine existent things. They need not consider non-existent facts nor engage in abstract and impossible metaphysical speculation. According as the facts are held to be in one relation or another the case is decided. If the consequence was produced in the requisite way from or by the act of omission, then the consequence is a proximate consequence, and the act or omission is a proximate act or omission. If it was not, then proximate cause and consequence do not exist. The learned phrase, *Causa proxima non remota spectatur,* becomes simply a maximatic way of saying, "Look at the act or the omission; and

never mind looking at anything in existence before that. The plaintiff says, 'This act did me an injury.' See if it really did." Either this is so or else the maxim can mean simply, "When you have found the proximate cause make the one accountable for that cause compensate the injured party for his injury." In either case, the maxim gives us no help in finding the proximate cause. We must get *that* from the decided cases by analysis and comparison. That analysis and comparison, I submit, gives us the following simple rules for finding a proximate cause of any injury:

1. If a forbidden act produces a force which causes an injury, that act is the proximate cause of the injury.

2. If a forbidden act creates that which causes a force to produce an injury, that act is the proximate cause of the injury.

3. If a forbidden omission fails to stop a force from causing an injury, that omission is the proximate cause of the injury.

4. If a forbidden omission fails to stop that which produces the cause of an injury, that omission is the proximate cause of the injury.

5. If a forbidden passive situation concurs with lawful activities, or with activities that are outside the purview of the law, to produce an injury, the forbidden passive situation is the proximate cause of the injury.